1979

Triangle Oil, Inc. , A Corporation v. North Salt Lake Corporation, Municipal Corporation of the State of Utah; John R. Graves, William D. Jackson, Richard v. Strong, Joe W. Vande Merwe, and Rodney J. Wood, Councilmen : Brief of Plaintiff-Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

TRIANGLE OIL, INC.,
a corporation,

Plaintiff and
Appellant,

Case No. 16269

vs.

NORTH SALT LAKE CORPORATION,
a Municipal Corporation of
the State of Utah; JOHN R.
GRAVES, WILLIAM D. JACKSON,
RICHARD V. STRONG, JOE W.
VANDE MERWE, and RODNEY J.
WOOD, Councilmen,

Defendants and
Respondents.

BRIEF OF PLAINTIFF-APPELLANT

Appeal from the Second Judicial District Court
of Davis County, State of Utah
The Honorable J. Duffy Palmer, District Judge

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NATURE OF THE CASE

The city, by ordinance, restricted to four the number of all beer licenses and refused without other cause to issue a Class A license to plaintiff for sale of beer in original containers for off-premise consumption in its combination grocery store-gasoline station.

DISPOSITION IN LOWER COURT

The trial court granted defendants' motion to dismiss with prejudice without other pleadings or trial (R. 59).

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a decree from this court reversing the order of dismissal of the trial court, and adjudging that in absence of cause found to be within the police power of the city, the plaintiff is entitled to be issued a Class A beer license.

MATERIAL FACTS

Plaintiff's complaint alleged in part as follows:

> 3. Plaintiff operates a business at 195 South Highway 89-91 within the city limits of said municipality consisting generally of the retail sale of gasoline, other petroleum products, groceries and food items under license issued by said municipality. Prior to September 5, 1978, plaintiff duly applied and tendered the fee for a Class A retail license to sell beer on said premises at 195 South Highway 89-91 in original containers for consumption off the premises.

The defendants declined to issue the license for the reasons set forth in a letter dated September 6, 1978, from the Honorable Robert Palmquist, Mayor of North Salt Lake Corporation, which stated:

"D. J. Allred
598 West 2600 South
Bountiful, Utah 84010

Dear Mr. Allred:

Your application for a retail beer license to sell beer at Triangle Oil Inc., 195 South Highway 89, was reviewed by the City Council at their regularly scheduled meeting on September 5, 1978. Due to the size of North Salt Lake and to the fact that there are now seven active beer licenses in the city, the council voted unanimously to disapprove your request. Their action in no way reflects upon you or your business. It merely reflects the council's feelings that there are now sufficient beer outlets within the city.

Sincerely,

Robert Palmquist
Mayor"

4. Ordinance No. 77-8 enacted by defendants on December 20, 1977, which became effective December 20, 1977, is entitled, AN ORDINANCE REPEALING AND REENACTING CHAPTER 9 OF TITLE 4 OF THE CITY CODE OF NORTH SALT LAKE TO PROVIDE FOR THE SALE, REGULATION, LICENSING AND RESTRICTIONS ON THE SALE OF BEER. Section 4-9-2 thereof provides:

"4-9-2. LICENSE TO SELL LIGHT BEER AT RETAIL. It shall be unalwful for any person to engage in the business of the sale of light beer at retail, in bottles, other orginal containers, or draft, within the corporate limits of the city without first having procured a license therefor from the council as hereinafter provided. A separate license shall be required for each place of sale and the license shall at all times be conspicuously displayed in the place to which it shall refer or for which it

shall be issued. All licenses shall comply with the Liquor Control Act of Utah and the regulations of the liquor control commission and every license shall recite that it is granted subject to revocation as hereinafter provided."

The complaint also alleged that:

> The said enabling statute does not provide that the city may restrict the number of licenses issued nor does it mention the sale ofbeer in "other original containers", but mentions only sale at retail, in bottles or draft.
>
> Accordingly, the city is without right or authority to enact an ordinance which restricts the number of licenses issued and endeavors to control sale of beer in cans or other original containers except bottle or draft.

Section 4-9-3 of the city ordinance provides in part:

> "4-9-3. LICENSE PRIVILEGES.
>
> A. Retail licenses issued hereunder shall be of the following kinds and shall carry the following privileges and be numbered numerically commencing from the number one:
>
> 1. Class "A" retail license shall entitle the licensee to sell beer on the licensed premises in original containers for consumption off the premises in accordance with the Liquor Control Act of Utah and the ordinances of the city."

Section 4-9-11 relates to restriction of numbers of licenses to be issued and provides:

> "J. The total number of businesses licensed to sell beer in the city of North Salt Lake Shall not exceed four, provided that this ordinance shall not operate to reduce the number of businesses now licensed to sell beer whether issued by this municipality of by the county if such business is annexed, nor shall it affect reapplications for such licenses."

The restriction does not appear in any enabling statute;

it does not distinquish between licenses for sale of beer for consumption off the premises under Class A license from sale of beer for consumption on the premises under a Class B license or consumption on the premises with the sale of meals under a Class C license.

The restriction of Class A licenses in not within the power or authority of the defendants and has no legal relationship to the police power of the city.

The trial court considered the written memoranda of the parties and ordered that the complaint be "dismissed with prejudice, failure to state a claim".

ARGUMENT

POINT I. CITY HAS NO POWER TO RESTRICT THE NUMBER OF CLASS A BEER LICENSES WITHOUT PROOF OF NECESSITY THEREFOR IN EXERCISE OF POLICE POWER.

Plaintiff operates one of its "Gas 'n Groceries" store at North Salt Lake and applied for a Class A beer license which would have permitted plaintiff to sell beer in original containers for consumption off the premises. Defendant city council refused to issue a license for the sole stated reason that there were presently sufficient beer outlets within the city. The city ordinance fixes the number of businesses licensed to sell beer at four without specifying any division among Classes A, B or C. Class B would allow consumption on the premises in containers or draft, and Class C allows similar consumption on premises only in connection with the sale of meals.

Plaintiff contends that city has no power to restrict the number of Class A beer licenses for the reason that such power has not been invested in the city by statute; that any power to regulate must have an intimate relationship to the public health, welfare or morals based upon evidence and facts; and that the provision allowing a reapplication by the same licensee for one of the restricted licenses is invalid.

Historically, the laws of Utah, 1935, Section 89, vested the Liquor Control Commission with authority to grant licenses to sell light beer at retail for off premises consumption and draft on premises. Section 91 established a limitation on the number of licenses for sale of light beer on draft according to population, but made no restriction on licensing for sale of beer in containers for off premise consumption. The laws of 1937 changed the act to allow licensing by cities under language as follows:

> 32-4-17. Light beer-Sales to minors. (a) Cities and towns within their corporate limits, and counties outside of incorporated cities and towns shall have power to license, tax, regulate or prohibit the sale of light beer, at retail, in bottles or draft; provided, that no such licenses shall be granted to sell beer in any dance hall, theater or in the proximity of any church or school. The commission granting the license shall have authority to determine in each case what shall constitute proximity.

The words "license", "tax" and "regulate" are the identical words used in 10-8-39 which authorizes cities to license certain businesses. The word "prohibit" is used in 10-8-42 which dates

back to 1898 and this section reads:

> 10-8-42. Intoxicating liquors-Regulation. They may prohibit, except as provided by law, any person from knowlingly having in his possession any intoxicating liquor, and the manufacture, sale, keeping or storing for sale, offering or exposing for sale, importing, carrying, transporting, advertising, distributing, giving away, exchanging, dispensing or serving of intoxicating liquors.

Thus 32-4-17 added nothing by way of power of cities to prohibit sales since this authority to prohibit under 10-8-42 antedates the former. The authority to limit Class A licenses must be found apart from the right to prohibit. Does the word "regulate" give such authority to restrict the number? Appellant contends it would do so only to the extent the city reasonably finds it necessary in exercise of its police power. The sale of beer in original containers for off premise consumption is not a nuisance per se, nor an evil recognized by statute or otherwise as requiring restriction. This is borne out by at least the following facts:

(1) The ordinance itself defines "nuisance" under 5 categories, none of which includes Class A situations.

(2) The Liquor Control Act, 32-1-2, defines police power as it relates to liquor in controlling saloons and unlawful selling:

> 32-1-2. This act shall be deemed an exercise of the police powers of the state for the protection of the public health, peace and morals; to prevent the recurrence of abuses associated with saloons; to eliminate the evils of unlicenses

> and unalwful manufacture, selling and disposing of alcoholic beverages; and all provisions of this act shall be liberally construed for the attainment of these purposes.

(3) It is not unlawful to drink alcohol and even to drive a vehicle if the amount of alcohol in the blood is .05 percent or less, which would be at least two bottles of beer (41-6-44).

(4) Acts characterized as evil or immoral as a matter of religion are not necessarily evil or immoral as a matter of law.

We acknowledge the right of the state to restrict licensing and withhold licensing without the necessity of giving any reason therefor. And, if specifically legislated, the state could authorize the limiting or restricting of licenses by cities. However, in absence of statute the city has no such right. This is set forth in the annotations in 163 ALR 581 from which we quote on page 582 as follows:

> Municipalities, too, when they are invested by state legislatures with the power to do so, may limit the number of liquor licenses which may be issued within their jurisdictions. State ex rel. Dixie Inn v. Miami (Fla) (reported herwith) ante, 577; Hall v. Kewanee (1942) 379 Ill 176, 39 NE2d 1009; Alamogordo Improv. Co. v. Prendergast (1940) 45 NM 40, 109 P2d 254; State ex rel. Saperstein v. Bass (1941) 177 Tenn 609, 152 SW2d 236.
>
> But it seems that municipal control may be superseded by a state beverage act which does not limit the number of licenses anywhere in the state, and reserves to municipalities only the right to enact ordinances regulating the hours of business and the location of places of

> business, and prescribing sanitary conditions. City of Miami v. Kichinko (1945) Fla 22 So2d 627, 630. In this case the court held invalid an ordinance which limited the number of liquor licenses according to population.

Since 32-4-17 utilizes the words license, tax and regulate similarly as contained in the licensing power of cities under 10-8-39, we analyze some cases dealing with the word "regulate" in connection with the latter.

In Salt Lake City v Revene (1942) 124 P2d 537, where the city sought to limit the hours which a barber shop could remain open in affirming the lower court in sustaining a demurrer to the complaint, Justice Wolfe wrote:

> [2] The municipality being a creature of the state delegated powers, the question arising here is whether this ordinance is within the police power delegated under Section 15-8-39; to "license, tax and regulate".
>
> [3,4] The word "regulate" is difficult to define in other terms because it involves a conception for which it stands more accurately than any synonym. It involves the making of a rule in reference to the subject to be regulated. Webster's International Distionary, (2nd Edition), defines the word to mean "to bring under the control of law or constituted authority". The rule making power given to cities in reference to barber shops does not mean any rule but such rules reasonably related and designed to protect the health of the public.
>
> In Ogden City v. Leo, 54 Utah 556, 182 P.530, 532, 5 A.L.R. 960, this court after defining regulation, said, "the foregoing illustrations are quite sufficient to show that, where the power 'to regulate' a particular calling or business is conferred on a city, it authorized such city to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary and wholesome in conducting the business

in a proper and orderly manner."

[5,6] The question resolves itself to this: Is the fixing of closing hours a reasonable regulation within the scope of the delegated police power, i.e. has it a reasonable relationship to the protection of health of the public?

Apparently the court found as a matter of law that regulating the hours of barbers had no relation to public health. Likewise, it would appear to be equally a matter of law that the limiting of the number of Class A licenses has no relation to public health, since such beer could readily be purchased from other licensees in and about North Salt Lake. No one could prove that the health of residents of North Salt Lake would be effected whether there were 100 such licenses or none at all.

Of course, the action of the city council in limiting licenses may be symbolic of the feelings of the council and many of their constituents that alcohol is evil and its use should be prohibited, however, this philosophy in a democracy should not be visited upon persons whose attitude toward moderate use of beeris that it is moral, lawful and less harmful than consumption of some softer beverages.

POINT II. THIS ATTEMPT TO LIMIT CLASS A BEER LICENSES IS ARBITRARY, UNREASONABLE AND DISCRIMINATORY.

Plaintiff's place of business is on U. S. Highway 91 and is the last business location selling groceries and gasoline at the south end of the city. It is properly zoned for business.

In Smith v. Barrett, 20 P2d 864, Utah (1933) it was

held that to attempt to limit gasoline service stations by requiring consent of adjoining property owners even though the property was within a zone allowing gas stations, was not allowable under the general welfare clause. A filling station is not a nuisance per se even though it may be operated to become a public or private nuisance according to the opinion which quoted the following with approval:

> "Under the Constitution, arbitrary power cannot be conferred upon the city council in the exercise of the police power of any other power it possesses. A gasoline filling station, properly constructed and properly operated, is not per se a nuisance. The city council may by reasonable ordinances establish zoning districts or define how gas filling stations may be constructed and how operated. But arbitray power to allow a gas filling station on one man's property and disallow it to another, without any definite rule by which the city council is to be governed, cannot be conferred, for this would be to give it power to deny equal rights to all the citizens."
>
> [7] Is it any less arbitrary, unreasonable, or discriminatory for a board of city commissioners to confer upon the owners of a specified foot frontage arbitrary power to allow a gas filling station on one man's property and, by refusal of consent, disallow it to another, than for a Legislature to confer a like power upon a city commission without a definite rule by which such action should be governed? We observe none, and, further, find no such power conferred by statute in this state.

The court further stated that such arbitrary power would deny equal rights to all citizens presumably under the Fourteenth Amendment.

POINT III. WITHOUT EVIDENCE SUPPORTING A NEED TO RESTRICT THIS LICENSE THE ORDER OF DISMISSAL WAS ERROR.

Justice Crockett, in the case of Ritholz v. City of Salt Lake, 3 U2d 385, Sec. 284 P2d 702, Utah (1955), where the city by ordinance prohibited the advertising of prices for eyeglasses, held that this was not within the powers granted cities nor was it authorized under general authority of 10-8-84 to preserve the safety, health and morals of the city. The court stated that cities are creatures of statute and limited in powers to those delegated by the Legislature, which powers should be strictly construed. We quote in part from this opinion:

> "In this particular context the power to regulate business can mean only such regulations as are reasonably and substantially related to the safeguarding of the public health which raises the question whether the advertising proscribed by the ordinance bears such a relation. This involves consideration of the constitutional as well as the ultra vires problem since the city cannot be authorized to do what the legislature itself has not the power to do.
>
> To begin with, we observe that the city offered no evidence at the trial to show any relationship between advertising eyewear and public health. There is urged before us only conclusions of law made by other courts, presumably upon the basis of some factual showing in each case. But we disregard this deficiency in the presentation of evidence and consider the contentions presented to us."

I would appear from Justice Crockett's opinion that evidence would have to be produced to justify the exercise of

limitation which defendants seek to place upon Class A licenses.

We have reviewed 32-1-8 which delineates the subjects of regulation by the commission, and none of which seek to restrict licensing under the guise of regulation. Also a review of 10-8-43 through 10-8-46 with respect to power of cities to regulate certain businesses such as food markets, sale of food and plumbing functions indicates what the legislature had in mind in the use of the words "regulate" or "regulation".

POINT IV. BEER LICENSING IS ENTITLED TO THE SAME REASONABLE TREATMENT AS OTHER BUSINESSES.

In the case of Anderson v. Utah County Board of Commissioners, (1979) 589 P2d 1214, this court stated:

> The same considerations of fundamental fairness and justice which prevent an administrative body from acting in a capricious or arbitrary manner in other areas of the law also apply in a beer license, even though it is a business which is subjected to a high degree of supervision and regulation in the interest of the public welfare.

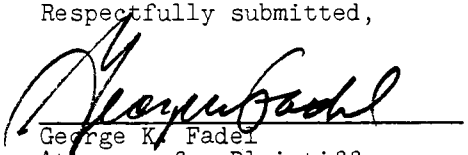
This same Anderson case also held that a denial of an application for renewal of a Class B beer license to a tavern without proper findings was error. Although the Anderson case held that in support of the spirit of free enterprise an existing licensee should be given preference on renewals where his business is found upon such license as in the case of a Class B license for a tavern, yet with respect to Class A licenses for grocery stores, if any authority to limit exists, these should be

rotated since beer is only one item of many upon which the grocery business is founded and while not critical to continued existence of the grocery store, it is a marked advantage which should not be perpetuated in monopoly. However, the proper perspective is to hold that there is no basis to limit, in the first place, the number of grocery stores with Class A licenses.

CONCLUSION

The order of dismissal with prejudice of the plaintiff's complaint should be reversed and the cause remanded to the District Court to order the defendant city to issue a Class A license to plaintiff in absence of reasonable evidence supporting a need for restriction of Class A beer licenses within the city in the proper exercise of its police power.

Respectfully submitted,



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